82-5095

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

JOHN WAYNE CONNER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

Nelson E. Roth, Esq.
The Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853
(607) 256-3408

QUESTIONS PRESENTED

I.

Whether the death penalty is imposed in violation of the eighth amendment, as construed in Godfrey v. Georgia and Gregg v. Georgia, where:

a) the jury imposes the sentence of death on a person who after drinking heavily all night with a friends, gets into a fight from which the friend dies;

b) there is no evidence of torture or the use of a deadly weapon and the only evidence as to the cause of the fight is the petitioner's statement; and

c) the judge in his charge to the jury merely recited the statutory language, "that the offense of murder for which the defendant stands convicted was outrageously or wantonly vile, horrible, or inhumane in that it involved depravity of mind or an aggravated battery to the victim" and the jury, completely misunderstanding the instruction, found the following aggravating circumstances: "the offense of murder was outrageously and wantonly vile, horrible and inhumane and that it did involve depravity of mind and aggravated battery to the victim."

II.

Whether the petitioner's due process and eighth amendment rights to a fair and impartial trial and sentencing hearing were violated:

a) where the state's highest court expressly

found that the prosecutor's repeated statements to the jury, at both the guilty and penalty phases, concerning his personal reasons for seeking the death penalty with comments such as, "As District Attorney . . . I have prosecuted nine murder cases . . . I have been responsible for prosecuting several terrible killings. I have never before sought the death penalty," were "not supported by any evidence and, moreover, [were] not relevant to any issue in the case" and were "therefore improper."

b) where a statement by the petitioner was admitted into evidence although it contained irrelevant and prejudicial matter, such as reference to a second, unrelated killing for which the petitioner had neither been tried nor convicted, and which the judge expressly ruled could not come directly into evidence because of its irrelevancy.

III.

Whether the Georgia death penalty statute violates the Eighth Amendment as interpreted in Gregg v. Georgia, Furman v. Georgia, and Lockett v. Ohio, where, out of the thirty-five states with death penalty statutes, only Georgia and one other state fail to guide in any fashion the sentencing authority's use of mitigating circumstances or to apprise the sentencing authority of the factors mitigating against imposition of the death penalty.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Court Rules

Miscellaneous

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No. 83-

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STATE OF GEORGIA,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

Petitioner, John Wayne Conner, respectfully prays that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of Georgia, entered on the 24th day of May, 1983.

OPINION BELOW

The opinion of the Georgia Supreme Court (App. A) is reported at _____ Ga. _____, _____S.E.2d _____ (1983).

JURISDICTION

The judgment of the Georgia Supreme Court was entered on May 24, 1983. There was no petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth. Eighth and Fourteenth Amendments to the Constitution of the United States.

Ga. Code Ann. § 17-10-30

17-10-35

STATEMENT OF THE CASE

On the evening of January 9, 1982, two friends - John Wayne Conner (petitioner) and James T. White (deceased) - attended a party in Eastman, Georgia [T. 170].* Both consumed substantial quantities of alcohol [T. 170-72, 239-40]. Petitioner's fiance, Beverly Ann Bates, and one Arthur ("Stacey") Burnham also attended the party [T. 171, 240]. After the party, petitioner, the deceased, Burnham, and Bates all returned in Burnham's truck to the residence of petitioner and Bates in Milan, Georgia [T. 172, 240]. Burnham left the group, [T. 172, 240] and shortly thereafter, Bates went to bed [T. 173].

Just before Bates retired for the evening, petitioner and the deceased left the home, on foot, apparently in search of more liquor [T. 172, 271, 330]. They took with them a partially full bottle of bourbon [T. 172-3]. The two arrived at a neighbor's house at 1:00 or 1:30 a.m. seeking transportation to a place where they could buy more liquor [T. 280]. The awakened neighbor, Pete Dupree, was unamused and refused to provide the requested transportation [T. 281]. At Dupree's house neither petitioner nor the deceased appeared upset or angry [T. 282]; the two walked off together, apparently still determined to find more liquor [T. 282].

After leaving Dupree's house, petitioner and the deceased somehow got into a fight. This fight resulted in the death of the deceased [T. 173, 271-2, 331]. The deceased had apparently been struck in the head with a bottle and beaten in the face, resulting in bleeding into the chest cavity and ceasing of the respiratory function [T. 209]. The state's expert witness who

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* All page notations preceded by a "T" refer to the trial transcript.

performed the autopsy on the deceased indicated that there were no signs of torture to the deceased [T. 225] and no clear evidence that more than one battery had occurred to the body of the deceased [T. 228]. On cross-examination, the state's expert witness admitted that some contusions on the deceased's hands might be consistent with the deceased having acted in an offensive manner [T. 225-7]. No one but the deceased and petitioner were present at the scene of the fight.

The cause of the altercation that developed between the petitioner and the deceased in the early morning hours of January 10, 1982 was a matter of considerable dispute at trial. The only direct evidence of what occurred was found in petitioner's statements, which were introduced at trial. In these post-arrest statements, petitioner indicated that the deceased had expressed a desire to engage in sexual relations with Bates (petitioner's fiance), and that these expressions by the deceased led to the fight [T. 186, 331].

The state's theory of the events which led to the death was based entirely on circumstantial evidence. Because petitioner was found to possess a five dollar bill stained with the blood of the deceased, the state reasoned that petitioner had killed his friend in order to obtain five dollars with which to buy more liquor.*

As a result of the death, petitioner was indicted in Telfair County, Georgia for the murder of James T. White; in the same indictment, petitioner was also charged with motor vehicle theft and armed robbery (based on the blood-stained five dollar bill). Petitioner pleaded not guilty, and was tried before a jury on July 12, 13, and 14, 1982. He was convicted on all three counts

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* A theory expressly found by the Georgia Supreme Court to be supported by insufficient evidence to justify a conviction for armed robbery. See page 6, infra.

and sentenced to death on July 14, 1982. The sentencing jury based its imposition of the death penalty on their conclusion that the death involved the aggravating circumstances of an outrageously and wantonly vile, horrible, and inhuman murder and a murder involving depravity of mind and a murder involving an aggravated battery to the victim [T. 466-7]. The jury specifically rejected armed robbery as an aggravating circumstance.

What occurred after the fight between petitioner and deceased was relatively undisputed at trial. Petitioner apparently returned home, picked up Bates, and fled with her in a stolen car (the basis for the auto theft charge). The couple was apprehended while en route to Gainsville, Georgia.

At the close of the state's case, petitioner presented no evidence on his own behalf. In closing argument at the guilt/innocence phase of the trial (before sentencing was at issue), the prosecutor, accepting petitioner's statement that he killed the deceased but rejecting the balance of petitioner's statements relating to the circumstances leading up to the fight, made the following remarks:

> I know of no one and have never been involved in a case which more graphically demonstrated an abandoned and malignant heart than the case we have here [T. 379] . . . Ladies and Gentlemen, as prosecutor, as defense attorney, I have been involved in criminal law for seven years. As District Attorney of this circuit, I have prosecuted nine murder cases. I have never before sought the death penalty. I have seen several killings. I have been responsible for prosecuting several terrible killings. I have never before sought the death penalty . . . What he [defense counsel] wants is you to use the fact that I'm going for the death penalty to try to get you to return some verdict other than murder so that the death penalty will not be able to be considered in this case. I mean, that's the real issue here. The real issue is the death penalty . . . I don't see that there is any way -- in all sincerety and all honesty -- that there is any way you could have any doubt in your mind as to whether John Conner murdered J. T. White . . . Are you at this time unconvinced that John Conner should die for this murder? [T. 398-99].

In his closing argument, the prosecutor also made use of a statement allegedly made by petitioner to sheriff's deputies during the course of the trial (. . . "they ought to give me a medal for killing them two sons of bitches instead of trying me for it . . .") [T. 377]. This statement refers to an unrelated

killing in another county for which petitioner had apparently been charged but not yet convicted.

After closing arguments and the court's charge to the jury, the jury, after fifty minutes of deliberation, returned a verdict of guilty on all counts [T. 433].

After return of the verdicts, the court proceeded with the bifurcated sentencing hearing. The state announced its intention to base its request for imposition of the death penalty on two aggravating circumstances: 1) the offense of murder was committed while the offender was engaged in the commission of a felony, to wit: armed robbery [Ga. Code § 17-10-30(b)(2)] (the only basis for this circumstance was the blood stained five dollar bill), and 2) the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind or an aggravated battery to the victim [Ga. Code § 17-10-30(b)(2)], [T. 437-8]. The state also announced its intention to introduce evidence at the sentencing hearing of the second killing referred to in petitioner's statement [T. 439]. The court expressly ruled that no evidence of the alleged second killing would be admissible in evidence during the sentencing hearing [T. 444]. This ruling appears inconsistent with the court's prior ruling which allowed introduction of the statement referring to the second, unrelated killing at trial.

In argument at the sentencing hearing, the prosecutor characterized the attitude of petitioner as follows:

> . . ."I killed them two sons of bitches and I don't care. I don't care about my life. I don't care about any of it. If they will just give me a chance I'll do it again." That's what he told Frank Mitchell* as he stood ready to go on trial for his

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* The underlined statements attributed to petitioner by the prosecutor appear nowhere in the record.

> very life that's what he told him. If there has ever been a depraved mind it belongs to John Wayne Conner. As I told you, I have never previously sought the death penalty in any murder case, but I tell you, I am seeking it now, and I am asking this jury to go back to that jury room and return a verdict, or a decision to send John Wayne Conner to the electric chair [T. 450].

After the closing arguments of counsel, the court charged the jury on sentencing [T. 454-61]. The court charged the jury that it could find the aggravating circumstances of "wanton and vile" murder and armed robbery. The jury was told it could "consider" mitigating circumstances. The court merely recited the statutory language on the potentially aggravating circumstances and on what constitutes an aggravated battery. The jury, apparently recognizing the weakness of the state's case on the five dollar armed robbery charge, explicitly rejected armed robbery as an aggravating circumstance. It nevertheless returned a verdict for the death penalty, apparently misunderstanding the court's charge to the extent that it found not the one remaining aggravating circumstance charged by the court and authorized by statute (Ga. Code § 17-10-30(b)(7)), but three separate aggravating circumstances, namely - an outrageously and wantonly vile horrible and inhuman murder, and a murder involving depravity of mind, and an aggravated battery [T. 466-7]. The court then imposed the death penalty upon petitioner.

The Georgia Supreme Court affirmed the convictions for murder and motor vehicle theft, but reversed the conviction for armed robbery because of insufficient evidence. Ga. , S.E.2d (1983). The Georgia Supreme Court also affirmed the death penalty. Although expressly conceding that the prosecutor had engaged in improper conduct, the court found that the prosecutor's argument did not require reversal, holding "that the 'passion' proscribed by [Georgia] law does not encompass all emotion, but only that engendered by prejudice, particularly racial prejudice, or other arbitrary factors." Id. (footnote omitted).

The federal questions raised in this petition were considered by the Georgia Supreme Court. The Court expressly

addressed the prosecutor's misconduct and took a position in conflict with the Eleventh Circuit Court of Appeals' decision in Hance v. Zant, 696 F.2d 940 (11th Cir. 1983). The Court also found that the petitioner's sentence was not excessive or disproportionate compared to other cases. In addition, all of the questions presented in this case were necessarily reviewed by the Georgia Supreme Court under Ga. Code § 17-10-35(c)(1), which calls for mandatory review of "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor. . ."*

I

THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE VIOLATES THE EIGHTH AMENDMENT AS CONSTRUED IN GODFREY V. GEORGIA AND GREGG V. GEORGIA.

A. The imposition of the death penalty where the evidence fails to show an aggravated battery or depraved mind constitutionally sufficient to justify the death penalty conflicts with this Court's decisions in Godfrey and Gregg.

1. A mere fight between two persons, who had been drinking heavily, resulting in the death of one does not constitute an aggravated battery constitutionally sufficient for the imposition of the death penalty.

Imposition of the sentence of death on a finding of aggravated battery in this case contravenes this Court's holding in Godfrey v. Georgia, 446 U.S. 420 (1979). The uncontroverted evidence shows that the petitioner and the deceased had been out to a party together and had been drinking all night [T. 172].

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* The Georgia Supreme Court has interpreted Ga. Code § 17-10-35 (c)(1) as requiring a broad consideration of the aggravating circumstances found by the jury and the evidence concerning the crime and the defendant. Conner v. State, Ga. , S.E.2d (1983).

They then returned home and set off in search of more liquor [T.172]. During their venture, they got into a fight which resulted in the death of the deceased [T. 198]. The Georgia Supreme Court held that this conduct was sufficient to support a finding of aggravated battery warranting the imposition of the death penalty.

Ga. , S.E.2d (1983).

In Godfrey, this Court held that the shotgun killing of two persons is not an aggravated battery warranting imposition of the death penalty. Godfrey, 446 U.S. at 433. In reaching this conclusion, the Court focused on the following facts: the absence of torture, death was instantaneous, and the deceased were family members who caused the petitioner emotional trauma. Id. at 132-133. The Court concluded that "the petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." Id. at 133.

The circumstances of the case now before the Court similarly fail to reflect "a consciousness materially more depraved than that of any person guilty of murder." Here, two men who had been drinking all night got into a fight -- a generic "bar-room brawl" which resulted in a death. As the state's medical expert testified, there was no evidence of torture [T. 225]. The pre-trial statements of the petitioner, introduced by the prosecution to prove the killing of the deceased by the petitioner, also indicated that the deceased may have provoked the incident by telling the petitioner that he wanted to sleep with petitioner's girlfriend [T. 186, 331]. Unlike the facts in Godfrey, a gun was not used, but only fists and a bottle. Moreover, there was no evidence of premeditation, nor any other motive for the killing (other than the purported robbery suggested by the prosecution, but which the jury rejected as an aggravating circumstance).

2. A killing during a brawl between two friends who had been drinking is not a sufficient basis for a

finding of a depraved mind justifying the imposition of the death penalty.

The finding of depravity of mind in this case violates the principles set forth in Gregg v. Georgia, 428 U.S. 153 (1975). In Gregg, this Court, in rejecting a facial challenge to the constitutionality of the statutory language "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery," clearly expressed its assumption that the statute would not be construed to permit the imposition of the death penalty on facts such as those involved here:

> It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction.

Id. at 201. In this case, Georgia has done exactly what this Court was confident it would not do: it has adopted an open-ended construction of the statutory language, and affirmed a finding that depravity of mind existed on facts such that the death penalty would be justified for virtually any murder.

B. The trial judge's mere recitation of the statutory aggravating circumstance of "wantonly vile" without any other guidance violates Godfrey.

In the sentencing phase of the case sub judice, the trial judge merely recited to the jury the statutory language of Ga. Code § 17-10-30(b)(7): "that the offense of murder for which the defendant stands convicted was outrageously or wantonly vile, horrible, or inhumane in that it involved depravity of mind or an aggravated battery to the victim [T. 456]. Other than reciting the statutory definition of aggravated battery [T. 457], he did not give the jury any guidance in applying these words to the facts of the case. [T. 456-458]. After a short deliberation, the jury, apparently misunderstanding the statutory language and the court's instruction, recommended the death

penalty based on three aggravating circumstances: "the offense of murder was outrageously and wantonly vile, horrible, and inhumane and that it did involve depravity of mind and aggravated battery to the victim" [T. 467]. The jury believed that they had found several aggravating circumstances when, in reality, they had only found one. Their confusion is further shown by the wording of their finding. They listed their finding in the conjunctive while the judge in his instruction used the disjunctive.

To avoid the confusion and misunderstanding faced by the jury, the trial judge should have explained the two-tiered test inherent in the statutory provision. First, the jury should have determined whether an aggravated battery or depraved mind existed. Upon finding one of these, they should then have determined whether the murder was outrageously or wantonly vile, horrible, or inhumane. If both of these steps were satisfied, and if the evidence was otherwise constitutionally sufficient to justify the conclusion, the jury then could have found that the aggravating circumstance of subsection (b)(7) existed. See, Hance v. State, 245 Ga. 856, 860 (1980), reh'g denied, (1980) (setting forth the two-tiered test -- which is used by the Georgia Supreme Court in reviewing subsection (b)(7) cases).

Consequently, even if the evidence considered by the jury in this case was sufficient to justify the imposition of the death penalty, the instruction here was so deficient so as to make it impossible to conclude that the jury's determination was not based upon passion, prejudice, or any other arbitrary factor. See, Ga. Code § 17-10-35(c)(1) (1983).

II

THE PROSECUTOR'S MISCONDUCT AND THE ADMISSION INTO EVIDENCE OF PETITIONER'S IRRELEVANT STATEMENT RENDERED THE PROCEEDINGS SO FUNDAMENTALLY UNFAIR AS TO RAISE IMPORTANT ISSUES OF DUE PROCESS AND EIGHTH AMENDMENT PROTECTION.

A. The Eleventh Circuit and Georgia Supreme Court are in conflict as to what constitutes "constitutionally intolerable" conduct.

Gregg v. Georgia, 428 U.S. 153 (1976), and Furman v. Georgia, 408 U.S. 238 (1972), forbid the imposition of the death penalty in an arbitrary and capricious manner based on extraneous factors. The Eleventh Circuit Court of Appeals in Hance v. Zant, 696 F.2d 940 (11th Cir. 1983) held that "dramatic appeal to gut emotion" by the prosecutor at the sentencing stage was a "constitutionally intolerable" extraneous factor in a death penalty case. The Georgia Supreme Court, in contrast, conceded that the prosecutor had acted improperly in the petitioner's case but rejected Hance's holding that emotional appeal is constitutionally prohibited. Ga. , S.E.2d (1983). Instead, the Georgia Supreme Court concluded that because "the imposition of the death penalty can never be a wholly rational, calculated or logical process," the Georgia statutory prohibition against a death penalty based upon "passion" was a narrow prohibition aimed primarily at racial prejudice. Id.

B. The prosecutor's misconduct substantially prejudiced the petitioner by placing prejudicial, extraneous facts before the jury.

The prosecutor, during both the guilt and penalty phases of the trial, made repeated statements as to his own reasons for seeking the death penalty. During his closing argument at the guilt phase, he stated that, "I know of no one and have never been involved in a case which more graphically demonstrated an abandoned and malignant heart than the case we have here" [T. 379]. The prosecutor then proceeded to tell the jury:

> "Ladies and gentlemen, as prosecutor, as defense attorney, I have been involved in criminal law for seven years. As District Attorney of this circuit, I have prosecuted nine murder cases. I have never before sought the death penalty. I have seen several killings. I have been responsible for prosecuting several terrible killings.

I have never before sought the death penalty" [T. 399].

Although the trial was still at the guilt phase, the prosecutor made clear that he was already arguing for the death penalty: "I mean, that's the real issue here. The real issue is the death penalty" [T. 399]. At this point, defense counsel objected to the state arguing for the death penalty at the guilt phase, and the objection was sustained [T. 399].

The prosecutor reiterated at the sentencing hearing that, based upon his own experiences as a prosecutor, the defendant in his opinion should be sentenced to death: "As I told you, I have never previously sought the death penalty in any murder case, but I tell you, I am seeking it now, and I am asking the jury to go back to that jury room and return a verdict or a decision to send John Wayne Conner to the electric chair" [T. 450].

Prosecutors are held to a higher standard of conduct than private attorneys because, as agents of the state, juries might place greater weight in their statements and arguments. United States v. Modica, 663 F.2d 1173, 1178 (1981). The courts have recognized the special danger that improper prosecutorial statements may cause the jury "to take less than full responsibility for their awesome task of determining life or death for the prisoners before them." Prevatte v. State, 233 Ga. 929, 214 S.E. 2d 365, 367 (1975). The prejudicial impact of the prosecutor's misconduct, therefore, was especially adverse to the petitioner as it went to the imposition of the death penalty; his comments allowed the jury to rely on the extraneous factor of the state's judgment in seeking the death penalty, which, in turn, enabled them to act in an arbitrary and capricious manner in violation of Gregg and Furman. Indeed, the Georgia Supreme Court in reviewing the petitioner's case candidly admitted that the prosecutor's statements were "not supported by any evidence and, moreover, was not relevant to any issue in the case. The argument was therefore

improper." Ga. , S.E.2d (1983).

Although this Court has not yet set forth standards, the lower courts have implemented the due process clause when reviewing prosecutorial misconduct through a substantial prejudice test. The test focuses on several factors: the strength of the government's case, the severity of the misconduct, and the curative effect of the judge's instructions. Modica, 663 F.2d at 1178.

(1) The State's Evidence

The weakness of the State's evidence makes it doubtful that the petitioner's acts constituted the aggravating circumstance of being "outrageously or wantonly vile, horrible, or inhumane in that it involved torture, depravity of mind or an aggravated battery to the victim." GA. CODE ANN. 17-10-30(b)(7). The Court has already noted the potential of this aggravating circumstance to be applied capriciously, Godfrey v. Georgia, 446 U.S. 420 (1979), and the prosecutor's comments heightened the danger that the jury would apply it in such a manner.

Indeed, it may have been the weakness of the state's case that compelled the prosecutor to assure the jury that he would seek the death penalty only where it was appropriate. Evidence of torture was completely lacking [T. 225], and evidence of depraved mind or aggravated battery sufficient to justify the death penalty was in dispute. No eyewitnesses were present at the scene, and the evidence indicates that the death occurred as the result of a fight between two drunk men of equal strength [T. 227, 251]. The encounter was described as a fight throughout the trial, and reason existed to believe that the victim fought back [T. 161, 164, 167, 198, 226, 241, 335, 336-37]. Furthermore, Georgia law allows the jury to find "mercy" even though it finds the aggravating circumstance, and the prosecutor's comments may have influenced the jury to reject "mercy."

(2) The Severity of the Misconduct

The prosecutor's comments constituted severe misconduct, as they were extensive pleas for the death penalty based upon his own experiences as a prosecutor. These statements were not isolated, offhand comments, but formed an integral part of the state's argument for the death penalty so as to manifest a pattern of misconduct. See, United States v. Gonzales, 488 F.2d 833 (2nd Cir. 1973). Moreover, the courts have observed that prosecutorial misconduct is more pronounced during short trials, United States v. White, 486 F.2d 204, 205 (2nd Cir. 1973), cert. denied, 415 U.S. 980 (1974), and this principle is particularly applicable to this case: not only was the trial short, but the sentencing hearing consisted solely of the prosecutor and defense counsel's arguments.

(3) Curative Actions by the Trial Judge

Although the judge did instruct the jury on the difference between argument and evidence at the guilt phase of the trial [T. 413], he did not make a similar instruction at the sentencing phase. The jury, therefore, may have viewed the prosecutor's comments as evidence to be considered in imposing the death penalty. The judge also failed to give any curative instructions in response to the misconduct at the time the comments were made. See, Modica, 663 F.2d at 1191.

C. The petitioner's due process and eighth amendment rights were violated by admitting into evidence petitioner's statement containing highly prejudicial, irrelevant evidence.

The tenets of Gregg and Furman in disallowing an arbitrary and capricious imposition of the death penalty based upon extraneous factors were also violated by the admission into evidence of the petitioner's statement made to law officers just before the beginning of his trial. One of the officers testified that the petitioner had told him:

> "they should give [petitioner] a medal for, I quote, for killing them two son of a bitches" [T. 345].
>
> ". . . and he brought up the incident about the time -- the escape from Dodge County where two inmates escaped, that Sheriff Jones was about to put him into the cell with these two inmates that did escape and that if he had escaped that they were fools for leaving the rifle in the truck, that if it had been him, he would have got the rifle, and that he would have left, as I quote "a bunch of you son of a bitches laying out there in the woods" [T. 345].

Despite defense counsel's objections to the statements as irrelevant and inflammatory, the full statement was admitted into evidence [T. 344-45].

Erroneous admission of evidence must render "the trial fundamentally unfair" to constitute a denial of due process. Burns v. Beto, 371 F.2d 598 (5th Cir. 1967). See, Ross v. Maloney, 372 F.2d 53, 60 (3rd Cir. 1967) (dissenting opinion). Portions of the petitioner's statement fall within the prohibitions of the Due Process clause. The statement about "killing them two son of a bitches" refers to a second killing which the petitioner had not been tried for or convicted of by a court. The prosecutor made extensive use of this portion of the statement during his closing argument at the guilt phase [T. 376-77], and the prejudicial effect was compounded by his use of it during the sentencing argument as well [T. 450].

The prejudicial effect is highlighted by the judge's refusal to let the state introduce direct evidence of the second killing. The judge expressly ruled that, "there must be some relationship between the cases much stronger than you have shown here, or from what you tell me the similarities would involve" [T. 444]. The prosecutor's use of the "killing them two son of a bitches" language thus achieved indirectly what the judge had ruled the state could not do directly.

The portion of the statement pertaining to the petitioner's boast that he would have killed the deputies and left them in

the woods is similarly prejudicial. The comment had no logical relevance to a determination of the petitioner's guilt and had no basis in fact; it served no purpose but to inflame the juror's minds. The prosecutor made extensive use of the statement in his closing argument [T. 377] and made further reference to it in his sentencing argument [T. 450].

Finally, the prosecutor used the statement to attribute comments to the petitioner that he never made. In the prosecutor's sentencing argument, he stated that the petitioner had said:

> ". . . I killed them two son of a bitches and I don't care. I don't care about my life. I don't care about any of it. If they will just give me a chance I'll do it again. That's what he told Frank Mitchell as he stood ready to go on trial for his very life that's what he told him [T. 450, emphasis added].

A review of Mr. Mitchell's testimony [T. 345] shows that he never testified that the petitioner had said, "I don't care about any of it. If they give me a chance I'll do it again." Yet, the prosecutor misquoted the statement in such a manner in an attempt to show the petitioner's depraved state of mind.

Even granting the deference given to state evidentiary rulings, admission of these irrelevant portions of the petitioner's statement constituted "fundamental unfairness."

III

THE GEORGIA DEATH PENALTY STATUTE'S FAILURE TO GUIDE THE SENTENCER'S USE OF MITIGATING CIRCUMSTANCES VIOLATES GREGG V. GEORGIA, FURMAN V. GEORGIA, AND LOCKETT V. OHIO, AND HAS GIVEN RISE TO A CONFLICT BETWEEN THE GEORGIA SUPREME COURT AND THE FIFTH CIRCUIT.

The Georgia death penalty statute does not direct the sentencer to 'weigh' aggravating circumstances and mitigating circumstances against each other or otherwise instruct the sentencer's use of mitigating circumstances; it only directs the sentencer to "consider" mitigating circumstances. GA. CODE ANN. 17-10-30. In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909,

49 L.Ed.2d 859 (1976), this Court identified the requirement of 'weighing' aggravating circumstances against mitigating circumstances as one of the most efficacious safeguards against arbitrary and capricious imposition of the death penalty:

> While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded 'that it is within the realm of possibility to point to the main circumstances of aggravation and mitigation that should be weighed and weighed against each other . . . While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly could be called capricious or arbitrary.

Id. at 194-195, 96 S.Ct. at 2934-2935 (emphasis supplied). Twenty-one of the thirty-five states with death penalty statutes have complied with this Court's directive by providing the sentencer with specific guidance concerning the use of mitigating circumstances, most often requiring that aggravating and mitigating circumstances should be weighed against each other. (See Appendix B). Because the Georgia statute fails to provide any such instruction, it creates a substantial risk that imposition of the death penalty in Georgia will be arbitrary and capricious.

The Georgia statute's silence on the use of mitigating circumstances has also given rise to a conflict between the Georgia Supreme Court and the Fifth Circuit Court of Appeals concerning the adequacy of trial judges' instructions on mitigating circumstances. In Spivey v. State, 241 Ga. 477, 246 S.E.2d 288 (1980), cert. denied, 439 U.S. 1039 (1980), the Georgia Supreme Court held that the trial judge's instructing the jury that they were "authorized to consider all of the evidence" satisfactorily guided the jury's consideration of mitigating factors even though the instruction did not mention, define, or explain those factors to the jury. The Fifth Circuit subsequently struck down this charge as violating Lockett's requirement of clear instructions

on mitigating circumstances. Spivey v. Zant, 660 F.2d 464 (5th Cir. 1981), cert. denied, 102 S.Ct. 2495 (1982).

A. The Georgia death penalty statute fails to apprise the sentencer of the information relevant to finding mitigating circumstances in violation of Furman and Lockett.

The Georgia statute's failure to apprise the sentencer of information relevant to the finding of mitigating circumstances both resurrects the unguided discretion condemned in Furman and prevents the sentencer from considering mitigating circumstances as Lockett requires. As this Court stated in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), "The requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty." Id. at 258, 96 S.Ct. at 2969. (emphasis supplied). Although twenty-nine of the thirty-five states with death penalty statutes comply with Furman by enumerating nonexclusive statutory mitigating factors (see Appendix C), the Georgia statute does not list any possible factors that could mitigate against death. Moreover, Georgia courts have held repeatedly that a capital defendant is not entitled to an instruction referring specifically to particular mitigating circumstances even upon request. See, e.g., Redd v. State, 242 Ga. 876, 252 S.E.2d 383 (1979); Gaddis v. Zant, 247 Ga. 717, 279 S.E. 2d 219 (1981); Bowen v. State, 244 Ga. 495, 260 S.E.2d 855 (1979).

By failing to apprise the sentencer of the information relevant to finding mitigating circumstances, the Georgia death penalty statute also causes the sentencer to remain unaware of what facts in the case may have mitigating effect and thereby prevents the sentencer from considering mitigating factors as Lockett requires. Lockett requires that the sentencer must be able to consider all factors which may call for a punishment

other than death. However, as the Fifth Circuit recognized in Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978), "this constitutional requirement to allow consideration of mitigating circumstances would have no importance if the sentencing authority is unaware of what it may consider in reaching its decision." Id. at 448.

Although Lockett is susceptible to being construed, as Justice Rehnquist feared, as allowing unfettered discretion in the finding of mitigating circumstances (see Rehnquist, J., concurring in part and dissenting in part, in Lockett v. Ohio, 438 U.S. at 628-636, 98 S.Ct. at 2973-2977), this reading is incorrect for two reasons. First, it ignores the fact that the finding of mitigating circumstances is not part of the decision to afford mercy, where guidance and reliability are not required, but is part of the determination of eligibility for the death penalty, where guidance and reliability are essential. That Georgia law permits the sentencing authority to afford mercy even absent mitigating circumstances demonstrates that the consideration of mitigating factors is antecedent to and separate from the decision to afford mercy. GA. CODE ANN. 17-10-30. Second, such an interpretation renders Lockett in conflict with Furman. Instead, Lockett should be read in conjunction with Furman; together these decisions require that jury discretion in finding mitigating circumstances must be channeled or guided but cannot be limited to consideration of an exclusive list of mitigating factors. The approach that the majority of states have adopted - providing a nonexclusive list of statutory mitigating circumstances - accomodates both Furman and Lockett.

The potential impact of the deficiencies in the Georgia statute is highlighted by the facts presented here. This was hardly a cold-blooded killing; in fact, petitioner and the deceased were friends, they had been drinking all evening together

[T. 170-172, 239-240], and when the killing occurred they were out searching for more alcohol together [T. 172, 271, 330]. If the jury had been instructed that any of these facts could have mitigating effect, it might have either found mitigating circumstances or decided to afford mercy.

B. Georgia's unequal treatment of aggravating and mitigating circumstances violates Lockett.

The Georgia death penalty statute's treatment of aggravating and mitigating circumstances is strikingly unequal. The statute enumerates ten aggravating circumstances justifying imposition of the death sentence but does not correspondingly list any mitigating circumstances. While the statute further requires that the trial judge orally instruct the jury on the aggravating circumstances, it does not require the judge to give instructions referring specifically to any particular mitigating factors. It also provides that the jury must be given written instructions which, reflecting the format of the statute itself, set forth each potentially applicable aggravating circumstance but provide only a general direction as to mitigating circumstances which does not delineate the mitigating effect of particular aspects of the defendant's character, record, or offense.

Express reference to particular aggravating factors in the jury instructions helps the jury recall the state's evidence and informs it that these factors can have the legal effect of mitigating in favor of death. By contrast, the general instruction on mitigating circumstances neither specifically reminds the jury of the defendant's evidence nor informs it that these particular factors can have mitigating effect. While petitioner recognizes that the state must enumerate aggravating circumstances in order to satisfy Furman and Gregg, those decisions neither necessitate nor countenance the gross inequality of treatment present in the Georgia statute.

This emphasis on aggravating factors to the virtual exclusion of mitigating factors violates this Court's mandate in Lockett that a capital sentencing authority must be permitted to give full consideration to each and every mitigating circumstance:

> When a procedure for giving jury instructions reduces the importance of any of the proffered mitigating circumstances in the minds of the jurors, it unconstitutionally precludes those factors from receiving effective sentencer consideration. The Georgia procedure has precisely this effect. The oral and written jury instructions emphasize and reinforce only the aggravating circumstances, and thus add weight to the aggravating side of the balance.

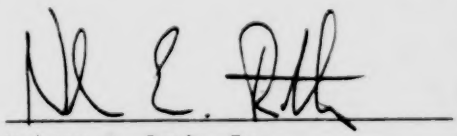
R. Hertz and R. Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 Cal. L. Rev. 317, 349 (1981).

Thus, even if a capital defendant does not have a general eighth amendment right to particularized instructions on mitigating factors, the need to offset the Georgia statute's nearly exclusive emphasis upon aggravating circumstances creates a corresponding right to specific instructions on mitigating circumstances.

CONCLUSION

The petition for a writ of ceriorari should be granted.

Respectfully submitted,



Nelson E. Roth, Esq.
The Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853
(607) 256-3408

July 14, 1983

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

JOHN WAYNE CONNER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

Nelson E. Roth, Esq.
The Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853
(607) 256-3408

TABLE OF CONTENTS TO APPENDICES

In the Supreme Court of Georgia Decided: MAY 21 1983

39325. CONNER v. THE STATE.

GREGORY, Justice.

Appellant, John Wayne Conner, was indicted in Telfair County for murder, armed robbery and motor vehicle theft. Because the state sought the death penalty for the murder, Conner's trial was conducted under the Unified Appeal Procedures set forth at 246 Ga. A-1 (1980), as amended, 248 Ga. 906 (1982).

At the time of the murder, Conner lived with his girlfriend, Beverly Bates, in Milan. On the evening of January 9, 1982, they rode with friends, including the victim, J. T. White, to a party in Eastman. After spending the evening drinking and smoking marijuana, the group returned to Milan around midnight. J. T., described by one witness as "humble and satisfied" and by another as "mellow," exited the vehicle with Conner and Ms. Bates at their house. Soon afterwards, Conner and J. T. left the house on foot, taking with them a nearly empty bottle of bourbon that Conner had purchased the night before. They walked to the home of Pete Dupree, woke him up, and asked him to take them to get more whiskey. He refused.

Then, according to Conner: "[M]e and J. T. left and went down the road. J. T. made the statement about he would like to go to bed with my girlfriend and so I got mad and we got into a fight and fought all the way over to the oak tree and I hit him with a quart bottle. He run over there to the fence trying to get through or across, I reckon, so I run over there and grabbed him and pulled him back and hit him again and he fell in the water and he grabbed my leg. I was down there at him right there in the ditch where he was at and he was swinging trying to get up or swinging at me to try to hit me one, and there was a stick right there at me, and I grabbed it and went to beating him with it."

The next day, J. T.'s body was found in a drainage ditch near the Milan Elementary School. Injuries on his forehead bore the pattern of the sole of a tennis shoe. His nose was broken, both his cheekbones were fractured, his eyes were swollen, and his left ear was severely damaged. He had been hit so hard in the face with a blunt object that teeth, as well as portions of the bone to which they were attached, were broken away from his upper and lower jaws. Dr. Larry Howard, who conducted the autopsy, testified that the trauma to J. T.'s head and face caused brain damage and bleeding in and around the brain which extended into his lungs, causing him to drown in his own blood.

Beverly Bates had gone to bed when Conner and J. T. left. When Conner returned, he woke her up and told her that they had to leave; he'd had a fight with J. T. and thought he was dead. Conner ripped off his shirt and threw it into the fire. He told Ms. Bates that he knew where a car was with its keys in it.

The car was parked in front of the school. Before they left town, Conner told Ms. Bates that "he had to be sure," and walked toward the ditch. She heard a thud. Conner returned, and said now he was sure, let's go. They stopped to get gas in Eastman. Ms. Bates gave Conner $20 to buy gas with; in return, he gave her a bloody $5 bill. They were caught in Butts County.

The $5 bill, as well as a whiskey bottle and a tree limb found near the body, were subsequently analyzed and found to have blood on them that was consistent with that of the victim and inconsistent with that of Conner (understandable, since Conner suffered no injuries during the "fight").

Conner presented no evidence, either at the guilt-innocence phase, or (against the advice of his attorney) at the sentencing phase of his trial. He was found guilty on all three counts and sentenced to death for the murder.

1. Appellant does not challenge the sufficiency of the evidence. However, Rule IV (B) (2) of the Unified Appeal Procedure requires this court to "determine whether the verdicts are supported by the evidence according to law." We find the evidence sufficient to support appellant's convictions for murder and motor vehicle theft, but we are unable to conclude that any rational trier of fact could have found all of the elements of the offense of armed robbery beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

"A person commits the offense of armed robbery when, with intent to commit theft, he takes property of another from the person or immediate presence of another by use of an offensive weapon . . ." OCGA § 16-8-41. The "taking of property is an essential element of the

crime of armed robbery." Woodall v. State, 235 Ga. 529, 533 (221 SE2d 794) (1975). The property alleged by the state to have been taken in the armed robbery was the bloody $5 bill which appellant subsequently gave to Ms. Bates.

No competent evidence was presented to show that prior to his murder, J. T. had money, or that appellant did not. Compare Rivers v. State, 250 Ga. 288 (1) (298 SE2d 10) (1982). The only circumstances which would support an inference that appellant took $5 from J. T. or from his immediate presence are two: (1) The money had J. T.'s blood on it, and (2) an empty leather pouch was found approximately eight and one-half feet from his body.

Appellant offered an explanation for the presence of blood on the money: In a pre-trial statement, appellant told an investigator that the $5 bill had been in the breast pocket of his shirt and had become saturated with the victim's blood during the fight. The leather pouch, which was not connected to J. T. except by its proximity to his body, had no blood on it.

"To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused." OCGA § 24-4-6. The evidence in this case does not meet this standard. "Only by speculation and conjecture could we assume that [appellant] . . . took the money, and speculation will not sustain a conviction." Woodall v. State, supra.

Appellant's armed robbery conviction must be reversed.

2. Appellant enumerates as error the trial court's refusal to give three of his requests to charge:

(a) The trial court did not err in refusing to charge on self-defense. See OCGA § 16-3-21. Appellant's own statement refutes a theory of self-defense and no other evidence in the record supports such a claim.

Nor should the trial court have charged on self-defense because "self-defense [was] the only defense raised." See, e.g., Jackson v. State, 154 Ga. App. 867 (2) (270 SE2d 76) (1980). Where there is no evidence to support a theory of self-defense, it is no more "raised" than any other defense not supported by evidence.

(b) For the same reasons, the trial court did not err in refusing to charge on good character as a defense.

"[A] defendant may present evidence of his good character as a substantive fact indicative of his innocence." Waters v. State, 248 Ga. 355, 366 (5) (283 SE2d 238) (1981). Where he fails to do so, however, to charge on good character would give the defendant the benefit of evidence which was never introduced, and if it had been, it might have been disputed. Jones v. State, 156 Ga. App. 56, 58 (3) (274 SE2d 99) (1980). See also, McDaniel v. State, 248 Ga. 494, 496 (4) (283 SE2d 862) (1981); OCGA § 24-9-20.

(c) The trial court did not err by failing to charge involuntary manslaughter, misdemeanor grade.

"A person commits the offense of involuntary manslaughter in the commission of a lawful act in an unlawful manner when he causes the death of another human being without any intention to do so, by the commission of a lawful act in an unlawful manner likely to cause death or great bodily harm . . ." OCGA § 16-5-3 (b).

Appellant's theory in support of this charge is that he acted in self-defense (the lawful act) but used excessive force (the unlawful manner). However, not only was there no evidence that appellant acted in self-defense, "[t]he number of wounds inflicted leaves no doubt on the question of intent or voluntariness." Anderson v. State, 248 Ga. 682, 683 (1) (285 SE2d 533) (1982).

SENTENCE REVIEW

3. The jury found the following statutory aggravating circumstance: "The offense of murder was outrageously and wantonly vile, horrible and inhuman in that it did involve depravity of mind and aggravated battery to the victim. OCGA § 17-10-30 (b) (7).

The evidence supports this finding. Appellant chased an unarmed, intoxicated victim[1] (who failed to leave a mark on his assailant) from the road, across a drainage ditch and into a barbed wire fence;[2] dragged him back to the drainage ditch; used a whiskey bottle, a heavy stick and his feet to beat and stomp the victim to death; and left him to die, lying in the water. The evidence shows that the defendant unnecessarily and wantonly inflicted serious physical abuse upon the victim

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[1] J. T.'s blood alcohol level was .27.

[2] A barbed wire fence on the side of the drainage ditch opposite the road had hair on it that was similar to that of the victim. The victim's coat had small, fresh tears on it consistent with damage from barbed wire.

prior to his death.[3] The facts of this case distinguish it from those cases in which a finding of § (b) (7) would not be appropriate. Compare, Phillips v. State, 250 Ga. 336 (6) (297 SE2d 217) (1982).

4. Appellant contends that the trial court committed error requiring reversal of his sentence when the court charged: "Please be mindful of the previous instruction that whether or not you find the aggravating circumstances, you still then have the further duty to decide whether or not the death penalty should be imposed or whether the defendant should be sentenced to life imprisonment. [Emphasis supplied.]"

The italicized portion of the instruction was incorrect. If the jury had failed to find at least one statutory aggravating circumstance, it would have had no further duty; the death penalty could not have been imposed. Instead of "whether or not," the trial court should have said "even if." It is well established, however, that "'[a] mere verbal inaccuracy in a charge, which results from a palpable "slip of the tongue," and clearly could not have misled or confused the jury' is not reversible error. Siegel v. State, 206 Ga. 252 (2) (56 SE2d 512) (1949)." Gober v. State, 247 Ga. 652, 655 (3) (278 SE2d 386) (1981). The charge, considered as a whole, clearly instructed the jury that it could not

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[3] "Torture occurs when the victim is subjected to serious physical abuse before death." Hance v. State, 245 Ga. 856, 861 (3) (268 SE2d 339) (1980). "An aggravated battery occurs when '[a] person . . . maliciously causes bodily harm to another by . . . seriously disfiguring his body or a member thereof.' [OCGA § 16-5-24 (a)]." Ibid. The trial court in this case defined aggravated battery to the jury. See Gilreath v. State, 247 Ga. 814 (16) (219 SE2d 650) (1981).

recommend a sentence of death unless it found at least one statutory aggravating circumstance, and that even if the jury found a statutory aggravating circumstance, it could nonetheless refuse to recommend a sentence of death. Hawes v. State, 240 Ga. 327 (9) (240 SE2d 833) (1977); Fleming v. State, 240 Ga. 142 (7) (240 SE2d 37) (1977). Thus, we find no reversible error in the court's charge.

5. An important aspect of our statutorily mandated independent review of death sentences is the requirement that we must determine whether or not the sentence of death "was imposed under the influence of passion, prejudice, or any other arbitrary factor." OCGA § 17-1-35 (c) (1). To make this determination, we must examine the entire record for the presence of factors improperly impacting on the decision to impose a sentence of death.[4]

Deciding the proper scope of this review is no mere matter of statutory interpretation: every decision to impose the death penalty implicates the procedural and substantive protections of the Eighth Amendment, and our review must, at a minimum, be sufficient to satisfy those protections. The ultimate arbiter of the extent of those protections is, of course, the United States Supreme Court; we are not bound by decisions of the lower federal courts. Nonetheless, it would be unduly myopic of us to ignore federal precedent, if only because of the

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[4] In addition to the review of the sentence required by OCGA § 17-10-35, the Unified Appeal Procedure requires this court, in death penalty cases, to evaluate the sufficiency of the evidence supporting the conviction and to review assertions of error timely raised during the trial proceedings whether or not such assertions are enumerated as error on appeal. Rule IV (B) (2).

inevitability of federal collateral review of every death penalty which survives state scrutiny.

In Hance v. Zant, 696 F2d 940 (11th Cir. 1983), a panel of the Eleventh Circuit, noting our statutory requirement that a sentence of death may not be imposed "under the influence of passion, prejudice, or any other arbitrary factor," held that a "dramatic appeal to gut emotion" by the prosecutor in his closing argument was "constitutionally intolerable" and that a "sentence of death imposed after such an appeal cannot be carried out." Id. at 952, 953.

In the case before us, as in every death penalty case, we have reviewed arguments of counsel. There are similarities between the argument of the prosecutor here and in Hance v. Zant. While the two arguments could be factually distinguished, the problem will undoubtedly arise in future cases, as well as in cases already tried and affirmed by us on appeal.[5] We feel compelled, in these circumstances, to decide whether Hance is correct in assuming that emotion is an altogether improper factor in a death penalty case.

The paucity of majority opinions by the U. S. Supreme Court in death penalty cases does not facilitate the task of determining the extent of Eight Amendment protections. However, certain conclusions can be drawn with reasonable assurance. First, the death penalty is not per se unconstitutional but (with possible rare exceptions) mandatory death penalty statutes are. Woodson

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[5] See, e.g. Williams v. State, 250 Ga. 553 (5) (300 SE2d 301) (1983); High v. Zant, 250 Ga. 693 (14) (300 SE2d 654) (1983).

v. North Carolina, 428 U. S. 280 (96 SC 2978, 49 LE2d 944) (1976); Roberts v. Louisiana, 428 U. S. 325 (96 SC 3001, 49 LE2d 974) (1976). Second, the discretion involved in death penalty sentencing can and must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U. S. 153, 189 (96 SC 2909, 49 LE2d 859) (1976). Third, "an individualized [sentencing] decision is essential in capital cases." Lockett v. Ohio, 428 U. S. 586, 605 (98 SC 2954, 57 LE2d 973) (1978).

The arbitrariness condemned in Furman v. Georgia, 408 U. S. 238 (92 SC 2727, 33 LE2d 346) (1972), is addressed in Georgia by a statutory scheme which allows the jury[6] to impose the death penalty only in those cases in which statutorily defined aggravating factors are present. This limitation on the jury's discretion helps "to distinguish cases in which the death penalty is imposed from the many cases in which it is not," Phillips v. State, 250 Ga. 336, 339 (297 SE2d 217) (1982). The proportionality review mandated by our Georgia death penalty law is a further protection against arbitrary decisions to impose the death penalty. Zant v. Stephens, 250 Ga. 97 (297 SE2d 1) (1982). Arbitrariness cannot be entirely eliminated, however, because the jury must be allowed, not only to consider, but to give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." Lockett v. Ohio, supra, 438 U. S. at 605.

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[6] Or other trier of fact--for convenience we will call it the jury.

A statutory scheme giving the jury the absolute discretion to recommend mercy in any given case, see Collier v. State, 244 Ga. 553, 569 (261 SE2d 364) (1979), allows some arbitrariness because in factually similar cases one jury might recommend mercy while another might not. Nonetheless, such a scheme avoids the risk that the death penalty will be imposed in spite of factors "too intangible to write into a statute" which may call for a less severe penalty, and avoidance of that risk is constitutionally necessary. Lockett, supra.

In a death penalty case, the jury must first determine whether or not the defendant is guilty. At this stage of the proceedings, the jury must find facts, to which it applies the law. Zant v. Stephens, supra. Thereafter, it must determine whether a statutory aggravating circumstance exists.[7] Again, the jury must find facts. Ibid. If these two determinations are made in the affirmative, the jury considers all evidence in extenuation, mitigation and aggravation of punishment. The ultimate decision, i.e., whether to impose the death penalty, is not itself a factual one, but one made after the facts are established. Ibid.[8]

In Gregg v. Georgia, Justice Stewart noted the social purposes said to be served by the death penalty: retribution, deterrence, and incapacitation. 428 U. S.

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[7] Except in cases of treason or aircraft hijacking, OCGA § 17-10-30 (c). In any case, of course, the jury may bypass this step and simply recommend a life sentence.

[8] See also, Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 45, 46, n. 213 (1980).

at 183.[9] Justice Stewart's discussion of retribution is particularly important, because it is clearly supported by a majority of the Supreme Court and because it demonstrates that an emotional response to properly admitted evidence regarding the defendant and his crime is not intrinsically unacceptable in death penalty cases:

"In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

> "'The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy--of self-help, vigilante justice, and lynch law.' Furman v. Georgia, supra, 408 U. S. at 308 (Stewart, J., concurring).

"'Retribution is no longer the dominant objective of the criminal law,' Williams v. New York, 337 U. S. 241 (67 SC 1079, 93 LE2d 1337) (1949), but neither is it a

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[9] Rehabilitation is not a justification for the death penalty. A defendant's prospects for rehabilitation may, however, mitigate in favor of a sentence less than death. Cf., Horton v. State, 249 Ga. 871, 881 (14) (295 SE2d 281) (1982).

forbidden objective nor one inconsistent with our respect for the dignity of man. [cits]. Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Gregg v. Georgia, supra, 428 U. S. at 183, 184 [footnotes omitted].

In a footnote were these additional comments:

"Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, spoke to this effect before the British Royal Commission on Capital Punishment:

"'Punishment is the way in which society expresses its denunciation of wrong doing: and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else. . . . The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not.' Royal Commission on Capital Punishment, Minutes of Evidence, Dec. 1, 1949, p. 207 (1950).

"A contemporary writer has noted more recently that opposition to capital punishment 'has much more appeal when the discussion is merely academic than when the community is confronted with a crime, or a series of crimes, so gross, so heinous, so cold-blooded that anything short of death seems an inadequate response.' Raspberry, Death Sentence, The Washington Post, Mar. 12, 1976, p. A 27, cols. 5-6." Gregg, 428 U. S. at 184 n. 30.

"Moral outrage," "grievous affront to humanity," "revulsion," "gross," "heinous," and "cold-blooded," are certainly not phrases devoid of emotional content.

The Fifth Circuit has noted that the "exercise of mercy . . . can never be a wholly rational, calculated, and logical process." Washington v. Watkins, 655 F2d 1346, 1376 n. 57 (5th Cir. 1981). It necessarily follows that the refusal to exercise mercy can never be a wholly rational, calculated, and logical process.

We are required by OCGA § 17-10-35 (c) (1) to invalidate any death penalty based on "passion, prejudice, or any other arbitrary factor." The Eleventh Circuit was doubtless influenced, in Hance, by the inclusion of the word "passion" in the code. As we have seen, however, the imposition of the death penalty can never be a wholly rational, calculated, or logical process.

We hold that the "passion" proscribed by our law does not encompass all emotion, but only that engendered by prejudice, particularly racial prejudice,[10] or other arbitrary factors. See, Cape v. State, 246 Ga. 520 (11) (272 SE2d 487) (1980); Blake v. State, 239 Ga. 292, 296 (2) (236 SE2d 637) (1977); Coley v. State, 231 Ga. 829, 834 (204 SE2d 612) (1974).

The scope of our review under OCGA § 17-10-35 (c) (1) is broad. We have recognized that "a jury's recommendation of the death penalty could not properly be based

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[10] See Spinkellink v. Wainwright, 578 F2d 582, 614 n. 38 (5th Cir. 1978): "In later Supreme Court opinions . . . [cits.] . . . when the Court spoke of Furman's condemnation of arbitrary and capricious imposition of the death penalty, implicit in its definition of arbitrariness and capriciousness was racial discrimination."

on constitutionally impermissible reasons, such as race or religious preference." Horton v. State, supra, 249 Ga. at 874. We have set aside death penalties where the trial court failed to properly charge the jury at the sentencing phase, whether or not such failure was objected to at trial or raised on appeal. See, e.g., Rivers v. State, 250 Ga. 303, 310-311 (8(a), 9) (298 SE2d 1) (1982); Hawes v. State, 240 Ga. 327 (9) (240 SE2d 833) (1977); Fleming v. State, 240 Ga. 142 (7) (240 SE2d 37) (1977). We have reversed death penalties when the defendant was erroneously denied the opportunity to present mitigating evidence, Sprouse v. State, 250 Ga. 174 (296 SE2d 584) (1982); Cobb v. State, 244 Ga. 344 (28) (260 SE2d 60) (1979); Sprouse v. State, 242 Ga. 831 (5) (252 SE2d 173) (1979); or where the Witherspoon voir dire was not recorded, Owens v. State, 233 Ga. 869 (2) (214 SE2d 173) (1975). We have considered alleged Witherspoon errors on their merits whether or not objections were made at trial. Castell v. State, Ga. (7(b)) (SE2d) (Case No. 39080, decided March 16, 1983); Davis v. State, 236 Ga. 804 (1) (225 SE2d 241) (1976). And we have examined allegedly improper argument whether or not objected to at trial. See, e.g., Horton v. State, supra at 875, 876; Gilreath v. State, 247 Ga. 814 (15) (279 SE2d 650) (1981); Thomas v. State, 240 Ga. 393 (7) (242 SE2d 1) (1977); Prevatte v. State, 233 Ga. 929 (6) (214 SE2d 365) (1975). What we have not done is invalidate a death penalty simply because the prosecutor made an impassioned argument to the jury during the sentencing phase of the trial.

We think it is clear that neither the Eighth Amendment nor OCGA § 17-10-35 (c) (1) forbids a death

penalty based in part on an emotional response to factors in evidence which implicate valid penological justifications for the imposition of the death penalty. Perforce, argument by the prosecutor which "dramatically appeals" to such legitimate emotional response is not "constitutionally intolerable." To the extent that Hance v. Zant holds to the contrary, we must disagree.

6. In this case, the prosecutor informed the jury that he had been involved in criminal law for seven years and that as district attorney for the circuit, had prosecuted nine murder cases. He told the jury that he had never before sought the death penalty, but he was seeking it now.

"The range of discussion [during closing argument] is wide--very wide . . .[11] [I]n his addresses to the jury it is [counsel's] right to descant upon the facts proven or admitted . . .; to arraign the conduct of the parties; impugn, excuse, justify or condemn motives, so far as they are developed in evidence; assail the credibility of witnesses, when that is impeached by direct evidence, or by the inconsistency or incoherence of [their] testimony, [their] manner of testifying, [their] appearance, or by circumstances. His illustrations may be as various as are the resources of his genius; his argumentation as full and as profound as his learning can make it; and he may, if he will, give play to his wit, or wing to his imagination." Mitchum v. State, 11 Ga. 615,

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[11] See Gregg: "We think that the Georgia court wisely has chosen . . . to approve open and far-ranging argument." 428 U. S. at 203. (Emphasis supplied.)

631 (1852). "Counsel may bring to his use in the discussion of the case well-established historical facts and may allude to such principles of divine law relating to transactions of men as may be appropriate to the case." Western and Atlantic Railroad Co. v. York, 128 Ga. 687, 689 (58 SE 183) (1907). Counsel for the state may forcibly or even extravagantly attempt to impress upon the jury "the enormity of the offense and the solemnity of their duty in relation thereto." Patterson v. State, 124 Ga. 408, 409 (52 SE 534) (1905).

However, counsel should not "go outside the facts appearing in the case and lug in extraneous matters as if they were a part of the case . . ." Smith v. State, 74 Ga. App. 777, 792 (41 SE2d 541) (1947). "What the law condemns is the injection into the argument of extrinsic and prejudicial matters which have no basis in the evidence." Floyd v. State, 143 Ga. 285, 289 (84 SE 580) (1915).

The portion of the prosecutor's argument referring to his prior criminal experience and the frequency with which he had sought the death penalty was not supported by any evidence and, moreover, was not relevant to any issue in the case. The argument was therefore improper.

As in Hance, no objection was made to these remarks. Were this not a death penalty case, such unobjected to remarks would present nothing for review. McAllister v. State, 231 Ga. 368 (1) (202 SE2d 54) (1973); Scott v. State, 229 Ga. 541 (6) (192 SE2d 367) (1972). Since this is a death penalty case, we have reviewed these remarks and conclude that they are not so prejudicial or offensive and do not involve such egregious misconduct on the part of the prosecutor as to require

reversal of appellant's death sentence on the basis that it was impermissibly influenced by passion, prejudice, or any other arbitrary factor.

7. After review of the record in this case, including matters dealt with in Divisions 1 and 6 of this opinion, we conclude that the sentence of death was not imposed under the influence of passion, prejudice, or other arbitrary factor.[12]

7. Appellant's sentence is not excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant. The similar cases listed in the appendix support the affirmance of the death penalty.

Judgment affirmed in part, reversed in part. All the Justices concur.

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[12] We note that although the jury erroneously convicted appellant of armed robbery, it did not find that the armed robbery was a statutory aggravating circumstance supporting the murder, although given the opportunity to do so.

APPENDIX

Williams v. State, 250 Ga. 553 (300 SE2d 301) (1983); Smith v. State, 249 Ga. 228 (290 SE2d 43) (1982); Cunningham v. State, 248 Ga. 558 (284 SE2d 390) (1981); Cervi v. State, 248 Ga. 325 (282 SE2d 629) (1981); Cape v. State, 246 Ga. 520 (272 SE2d 487) (1980); Hance v. State, 245 Ga. 856 (268 SE2d 339) (1980); Hamilton v. State, 244 Ga. 145 (259 SE2d 81) (1979); Alderman v. State, 241 Ga. 496 (246 SE2d 642) (1978); Thomas v. State, 240 Ga. 393 (242 SE2d 1) (1977).

APPENDIX B

States Requiring 'Weighing' Or Otherwise Providing Instructions On The Use Of Mitigating Circumstances: Twenty-One Of Thirty-Five States Having A Death Penalty

Alabama	ALA. CODE 13A-5-48
Arkansas	ARK. STAT. ANN. 41-1302
California	CAL. PENAL CODE 190.2,3
Delaware	DEL. CODE ANN. 11:4209 (1979 repl. vol.).
Florida	FLA. STAT. ANN. 921.141 (West. 1982 pocket part).
Idaho	IDAHO CODE 19-2515 (1979).
Maryland	MD. ANN. CODE 27-413 (1982 pocket part).
Massachusetts	MASS. GEN. LAWS ANN. 279.69 (1982 supp.).
Mississippi	MISS. CODE ANN. 99-19-101 (1982 pocket part).
Missouri	MO. REV. STAT. 40A-565.012 (1979).
Montana	MONT. CODE ANN. 46-18-305 (1981).
Nebraska	NEB. REV. STAT. 2902522(2) (1979).
Nevada	NEV. REV. STAT. 175.554(1c) (1981).
New Jersey	N.J. STAT. ANN. 2C:11-3(3) (West. 1982).
New Mexico	N.M. STAT. ANN. 31-20A-2(B) (1978).
North Carolina	N.C. GEN. STAT. 15A-2000 (1981 cum. supp.).
Ohio	OHIO REV. CODE ANN. 2929.03 (Baldwin 1982).
Oklahoma	OKLA. STAT. ANN. 21-701.11 (West. 1982).
Tennessee	TENN. CODE ANN. 39-2-203 (1982).
Wyoming	WYO. STAT. 6-4-102 (1977).

APPENDIX C

States Enumerating Nonexclusive Statutory Mitigating Factors: Twenty-Nine Of Thirty-Five States Having A Death Penalty.

Alabama	ALA. CODE 13A-5-51.
Arizona	ARIZ REV. STAT. ANN. 13-703 (1982 pocket part).
Arkansas	ARK. STAT. ANN. 41-1304.
Colorado	COLO. REV. STAT. 16-11-103 (1978).
Connecticut	CONN. GEN. STAT. 53a-46a (1983 pocket part).
Florida	FLA. STAT. ANN. 921.141 (West 1982 pocket part).
Illinois	ILL. STAT. ANN. 7A.04 (Smith-Hurd 1982 pocket part).
Indiana	IND. CODE ANN. 35-50-2-9 (Burns 1979 repl. vol.).
Kentucky	KY. REV. STAT. 532.025 (1981 cum. supp.).
Louisiana	LA. CODE CRIM. PROC. ANN. 905.5 (West 1983 pocket part).
Maryland	MD. ANN. CODE 27-413 (1982 pocket part).
Massachusetts	MASS. GEN. LAWS ANN. 279.69 (1982 supp.).
Mississippi	MISS. CODE ANN. 99-19-101 (1982 pocket part).
Missouri	MO. REV. STAT. 40A-565.012 (1979).
Montana	MONT. CODE ANN. 46-18-304 (1981).
Nebraska	NEB. REV. STAT. 29-2523(2) (1979).
Nevada	NEV. REV. STAT. 200.035 (1981).
New Hampshire	N.H. REV. STAT. ANN. 630.5 (1981 supp.).
New Jersey	N.J. STAT. ANN. 2C:11-3(5) (West 1982).
New Mexico	N.M. STAT. ANN. 31.20A-6 (1978).
North Carolina	N.C. GEN. STAT. 15A-2000 (1981 cum. supp.).
Ohio	OHIO REV. CODE ANN. 2929.04 (Baldwin 1982).
South Carolina	S.C. CODE ANN. 16-3-20(b) (1982 supp.).
Tennessee	TENN. CODE ANN. 39-2-203 (1982).
Utah	UTAH CODE ANN. 76-3-207 (1978).
Virginia	VA. CODE 19.2-262.4 (1982).
Washington	WASH. REV. CODE ANN. 10.95.070 (1982).
Wyoming	WYO. STAT, 6-4-102 (1977).

SUMMARY

Of the thirty-five states having death penalty statutes, only Georgia, South Dakota and Texas neither instruct the sentencer's use of mitigating circumstances nor apprise the sentencer of the factors mitigating against death. However, Texas otherwise structures the sentencer's consideration of mitigating circumstances by requiring the sentencer to answer three questions which simultaneously address both aggravating and mitigating circumstances through a "whether or not" format. Only Georgia and South Dakota neither instruct the sentencer on the use of mitigating circumstances nor apprise the sentencer of the information relevant to mitigation. Thus, Georgia's statute is one of the two least protective and most deficient death penalty statutes in the nation.

APPENDIX D

ARTICLE 2
DEATH PENALTY GENERALLY

17-10-30.

27-2534.1 Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed.

(Acts 1973, pp. 159, 163.)

17-10-35.

27-2537 Review of death sentences

(a) Whenever the death penalty is imposed, upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court.

(b) The Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection (b) of Code Section 17-10-30; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant.

(d) Both the defendant and the state shall have the right to submit briefs within the time provided by the court and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court in its decision and the extracts prepared as provided for in subsection (a) of Code Section 17-10-37 shall be provided to the resentencing judge for his consideration.

(f) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

(Acts 1973, pp. 159, 165.)

No. 83- 5095

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN WAYNE CONNER,

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, by and through his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to Supreme Court of the State of Georgia without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 46 of the Rules of this Court.

Petitioner's Affidavit in support of this motion is attached hereto as "Exhibit A."

Respectfully submitted,

Nelson E. Roth, Esq.
The Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853

ATTORNEY FOR PETITIONER

STATE OF NEW YORK

COUNTY OF TOMPKINS

COUNSEL'S AFFIDAVIT

Before the undersigned, an officer duly authorized by law to administer oaths, appeared Nelson E. Roth who, being duly sworn, deposes and says as follows:

I am a member in good standing of the Bar of the State of New York.

I am an attorney of record for Petitioner;

I have agreed to represent Petitioner without fee or remuneration of any kind;

I have investigated Potitioner's financial circumstances and have determined that he is without the funds necessary to bring this action;

Petitioner is currently incarcerated under the custody of the State of Georgia at the Georgia Diagnostic and Classification Center in Jackson, Georgia;

I have made this Affidavit because there is insufficient time in which to obtain Petitioner's Affidavit of Poverty.

Petitioner's Affidavit of Poverty will be sent to this Court as soon as is practical.

NELSON E. ROTH
ATTORNEY FOR PETITIONER,
John Wayne Connor

Sworn to and subscribed before me,
this the 15th day of
July, 1983.

Notary Public

My Commission expires:

March 30, 1985